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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 97.

FRANK COLE BROWN, *Plaintiff in Error,*

v.

CHARLES DUNCAN GURNEY.

No. 98.

JOSIAH APPLETON SMALL, *Plaintiff in Error,*

v.

FRANK COLE BROWN.

No. 99.

FRANK COLE BROWN, *Plaintiff in Error,*

v.

JOSIAH APPLETON SMALL.

Brief and Argument for Brown, Appellant in Nos. 97 and 99 and Appellee in No. 98.

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PRESS OF W. F. ROBERTS COMPANY, WASHINGTON, D. C.

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STATEMENT OF THE CASE.

These cases (two) were brought in the District Court of Teller County, Colorado, by the appellee Gurney and appellant and appellee Small in support of their adverse claims and protests filed in the local U. S. land office, as claimants of the Hobson's Choice and P. G. lode mining claims, respectively, against the application of the appellant Brown for patent for the Scorpion lode mining claim.

The complaint filed by Gurney sets up his title to the Hobson's Choice claim located June 23, 1898, and its conflict with the Scorpion claim, and alleges in effect that the area in conflict was not unoccupied and unappropriated public domain when the defendant entered and located the Scorpion claim on May 14, 1898. The only peculiarity to be noticed is the allegation

> "that the defendant has ever since hitherto wrongfully withheld possession of the area in conflict from the plaintiff,"

which relates to the time of location of the Scorpion claim and amounts to an admission that Brown, as locator of the Scorpion, maintained continuous exclusive possession of the area in conflict.

The complaint filed by Small sets up his title to the P. G. claim and its conflict with the Scorpion claim and alleges that the defendant "has wrongfully entered upon" the area in conflict and "has ever since wrongfully withheld and now wrongfully withholds possession" thereof.

The defendant filed in each case a general denial and a further answer and cross-complaint setting up title to the Scorpion claim by virture of prior discovery, location and appropriation.

In the trial court the cases were consolidated for the purpose of trial and tried together, without a jury, upon an agreed stipulation as to facts which eliminated all controversy as to the performance by each of the three claimants of all the acts required by law in the discovery, location, appropriation and maintenance of his claim, saving and reserving, however, with respect to each claim,

the question of whether the land covered thereby was vacant and unappropriated at the time of location, the reservation in the case of the Scorpion claim being expressed in the plural and covering two amended locations as well as the original location.

(Page references unless otherwise indicated are to the record in No. 97, Brown *v.* Gurney.)

It appears from the stipulation that Brown discovered and located the Scorpion claim May 13, 1898, and filed his certificate of location within three months thereafter, the date of filing not being stated; that he made an amended location on July 15, 1898, and the same day filed an amended certificate of location; and that on the following day, July 16, 1898, he made a second amended location and the same day filed a second amended certificate of location (R., pp. 19, 20).

That on June 22, 1898, Gurney discovered and located the Hobson's Choice claim and filed his certificate of location within three months thereafter, the date of filing not being stated (R., pp. 21, 22).

That on July 16, 1898, Small discovered and located the P. G. claim and filed his certificate of location within three months thereafter, the date of filing not being stated (R., pp. 20, 23).

As appears from the descriptions of the claims and areas in conflict in the pleadings, which in the stipulation are admitted to be correct (R., p. 24), the three claims cover substantially the same ground, and, so far as was within the power of the parties, the stipulation eliminated all issues except the question of whether the land was vacant and unappropriated when any of the locations were made.

The remainder of the stipulation relates to proceedings

in the land department purporting to be action in the matter of mineral entry No. 573, made by the Cripple Creek Gold Mining Company upon the Kohnyo and Fortuna lodes: but there is nothing in the stipulation itself, or the copies of such proceedings attached thereto as exhibits, showing any relevancy to the issue. In Exhibit K, decision of the Commissioner of the General Land Office of July 15, 1898, there appears (R., p. 59) a recital that F. C. Brown filed a protest averring that he is the owner of the Scorpion lode claim in conflict with the Southerly portion of the Kohnyo claim, but the extent of the conflict is not set forth, and, in any event, such a recital is not evidence.

The trial court found the issues in favor of Brown and entered judgment accordingly (R., p. 13-15,) the grounds of such finding and decision not appearing.

On appeal the Supreme Court of the State was confronted with the question of the relevancy of the proceedings in the matter of the Fortuna and Kohnyo claims, and in their opinion filed in the cause (R., 64) they state the question and dispose of it in the following language:

"Counsel for appellee, however, contend that the judgment must be affirmed because the agreed facts fail to identify the premises in dispute as part of the Kohnyo claim; do not establish the validity of that location, nor affirmatively show that the premises, when located as the Scorpion, were not part of the unappropriated public domain. The agreed statement will not bear this construction. It is evident from the record and the *briefs* of counsel, that the only question submitted for trial and the only one which the parties intended to litigate and have determined by the trial court was the time when the premises in controversy reverted to the public domain, and the judgment respecting their rights which would follow

the conclusion of law on this question. Or, in other words, the only question really submitted for trial was the point of time at which the premises in controversy were open to location. Upon the determination of this question, the decision as to which of the respective locations was valid, depended. This is apparent from the agreed statement of facts, for thereby it was conceded that each of the parties litigant had complied with all the requirements of the law in the location of their respective claims, as set forth in their respective pleadings, saving and excepting it was not admitted that at the time of the respective locations the ground in controversy was subject to location. As to each claim this question was reserved for the decision of the trial court by the following provision;

'Provided, however, that it is not admitted that at the time of said location the ground embraced in said location was a part of the vacant and unappropriated public domain.'

"Counsel for appellee concede that the tract in controversy is substantially identical with the South tract of the Kohnyo lode, but say that such fact is not disclosed by the record. If not, it is rather strange that in the preparation of the agreed statement the various steps affecting the Kohnyo location were set out with such particularity. A discussion of the main question in the cases will demonstrate that the stipulated facts do establish the validity of the Kohnyo location, and that at the date of the location of the Scorpion the premises therein included were not a part of the unappropriated public domain. Appellee, however, is estopped from raising any of these questions now. His counsel state in their brief:

"'Upon the trial in the court below the stipulation of facts was not read by either party. * * * It was upon taking up the record before this court for the preparation of appellee's brief that the question of relevancy of the exhibits attached to the stipulation of facts first presented itself, * * *. From an examination of the record it

would appear to be a certainty that the case was tried in the lower court upon the assumptions which are wholly unsupported by the written evidence contained in the agreed statement of facts. * * * The truth of the matter is, that after the preparation, execution and filing of the agreed facts, the stipulation containing such facts was never again read or digested by any of the parties in interest. The trial court and counsel for all the parties litigant assumed that the stipulation covered facts which, upon investigation, we fail to find.'

"Facts assumed to be true on the trial of a cause cannot afterwards be contested on appeal—2 Cyc., 675. In short, it appears that counsel for both sides, on the trial of the cause, construed the stipulated facts as covering these questions, and on appeal they will be held to that construction. Again, none of these questions were raised in the court below. Had they been, and the attention of the court and counsel been called to the fact that the agreed statement omitted material facts, opportunity would have been afforded to correct the alleged omissions either by further stipulation or testimony. One of the cardinal principles of appellate procedure is, that questions sought to be reviewed shall first be brought before the trial court for decision. Otherwise a court of review would often be compelled to decide purely original questions which the trial court was given no opportunity to decide or determine—Elliott's Appellate Procedure, 489."

This court is thus confronted at the outset with the question, can deficiencies in the record be supplied in the manner adopted by the Supreme Court of the State in order to reverse the judgment of the trial court or must it be held that the record presents no evidence upon the question of whether the area in question was unappropriated public domain?

Gurney, as appellant in the court below, as an answer

to our point that the record failed to show the identity of the Southerly 700 feet of the Kohnyo claim with the ground in question, contended that, if the record were silent upon that point, there was no evidence upon the question whether the ground in dispute was unappropriated and, therefore, the act of March 3, 1881, would necessitate a judgment against both parties inasmuch as the burden was upon each of the parties to establish the fact that the land was unappropriated at the time of his location, but we contend that in the absence of evidence to the contrary the presumption must be that the land was unappropriated public domain when Brown made his original location of the Scorpion lode on May 13, 1898, and, the validity of such location in all other respects being admitted, Brown would prevail by reason of priority.

The ruling of the Supreme Court of the State upon the relevancy of the proceedings in the Land Department referred to seems, however, to make it necessary to argue the case upon the assumption that the three locations—Scorpion, Hobson's Choice, and P. G,—cover substantially the part of the Kohnyo claim described as the 700 feet thereof south of the Mount Rosa Placer, and, therefore, in order to fully present the case, we analyze and abstract that phase of the stipulation.

It is to be observed at the outset that the extent of the stipulation in every instance is only to admit that on such a date the Commissioner of the General Land Office or Secretary of the Interior rendered a decision, of which a copy is attached. There is no admission as to the location and maintenance of the Kohnyo claim, application to make entry, or issuance of certificate of entry or final receipt; and the question at once arises whether a copy of a decision

by the Commissioner of the General Land Office or the Secretary of the Interior is evidence of anything more than that on the day of its date such officer signed such a paper.

Exhibit A is a decision of May 28, 1895, by the Commissioner of the General Land Office reciting that a certain area in conflict between the Kohnyo claim and the Mount Rosa patented placer claim had been excluded from the Fortuna-Kohnyo entry and that such excluded area divided the Kohnyo claim into two non-contigeous tracts, one north of the placer claim extending about 500 feet in length along the lode line and containing the discovery shaft and improvements, and the other, south of the placer claim and extending for a distance of about 700 feet (see diagram, R., p. 32), and holding that the right to the Kohnyo lode terminated where it intersected the placer claim and that only one of the segregated tracts could be embraced in the entry, giving the claimant the right to elect which tract it would retain and allowing sixty days in which to furnish evidence of discovery of mineral in the South tract and the expenditure of $500 thereon in case that tract should be retained, or to appeal, *in default of which the entry would be canceled as to the South tract without further notice.*

It does not appear when notice pursuant to this decision was served, but in **Exhibit B** (R., p. 25), decision by the Commissioner of the General Land Office of September 16, 1895, it is recited that he is in receipt of letter of the local officers dated August 14, 1895, transmitting a petition of the claimant of the Kohnyo lode asking that it be allowed under the then recent South Star decision (20 L.D., 204) to make application for patent for the area in conflict

with the placer upon the theory that the Kohnyo was a known lode within the placer at the time of application for patent therefor, and the local officers were directed to notify the Kohnyo claimant that it was allowed thirty days to apply for a hearing to determine whether the Kohnyo location contained a valuable lode within the placer limits and whether such lode was known to exist at the time of application for patent for the placer, and also to advise the claimant that in the event of failure to apply for a hearing within the time allowed the decision of May 25, 1895, would become final and the entry canceled in part.

In **Exhibit C** (R., p. 27), decision of the Commissioner of the General Land Office of January 8, 1896, it was stated that by office letter dated September 16, 1895 (Ex. B), the decision of May 28, 1895 (Ex. A), was modified and a hearing allowed (R., p. 29), and a motion by the assignee of the patentee of the Mount Rosa placer for review of the decision of September 16, 1895, and revocation of the order for hearing, was denied.

Exhibit D (R., p. 33), Commissioner's decision of February 5, 1896, dismissed an attempted appeal by the Mount Rosa owner, and **Exhibit E** (R., p. 35), decision of the Secretary of the Interior, April 7, 1896, denied an application by the same party for *certiorari*.

Exhibit F (R., p. 37), is Commissioner's decision of October 22, 1897, on appeal from the local officers, holding that the Kohnyo was not a known lode within the placer at the time of application for placer patent, and denying the application of the Kohnyo claimant for leave to make application for the ground in conflict with the placer.

Exhibit G (R., p. 45), is Secretary's decision of May 7, 1898, on appeal, sustaining the Commissioner.

On May 14, 1898, Brown located the Scorpion claim.

Exhibit H (R., p. 51), is the following paper, which it is stipulated was filed in the General Land Office on June 14, 1898:

STATE OF RHODE ISLAND,
County of Providence } *ss:*

Lyman B. Goff, of lawful age, being first duly sworn, deposes and says that he is the duly elected and acting president of the Cripple Creek Gold Mining Company, which company is the owner of the Kohnyo and Fortuna Lode Mining claims, covered by Pueblo, Colorado, mineral entry No. 573, which was made March 6, 1895.

Affiant says that he has been duly advised as to the contents of a letter or decision of the Commissioner of the General Land Office of date May 28, 1895, and of the decision of the Secretary of the Interior of date of May 7, 1898.

With authority so to do, affiant hereby waives the right of review of the last mentioned decision, and elects to retain in said M. E. No. 573, that portion of the Kohnyo Lode claim which is described in the above mentioned letter of the Commissioner as "the five hundred feet on the North."

Further affiant saith not.

LYMAN B. GOFF.

Subscribed and sworn to before me, this 10th day of June, A. D. 1898,

ANDREW M. HULL,
Notary Public.

It will be observed that this paper was signed by Lyman B. Goff individually and, although evidently intended to be, was not expressed as, the act of the company, and, even though it could be regarded as purporting to be the act of

the company, the question arises whether the president of a corporation has power to relinquish property rights of the corporation acquired by entry of public land. This becomes especially significant when it is observed that three days later, on June 17, 1898, as appears by recital in Exhibit K, Commissioner's decision of July 15, 1898, at page 57 of the record, the claimant of the Kohnyo claim filed a petition praying that it be allowed under its then present application to patent the two detached parts of the Kohnyo claim, and, by recital in Secretary's decision of June 3, 1899, referred to in Exhibit J, at page 56 of the record, as being reported in 28 L. D., 451, it appears that it was also moved that action on the paper filed June 14, 1898 (Ex. H) be withheld until the application to retain the two detached portions of the Kohnyo claim should be finally disposed of.

On June 23, 1898, Gurney located the Hobson's Choice claim.

On July 15, 1898, the Commissioner of the General Land Office rendered a decision, **Exhibit K** (R., p. 57), reciting that the contest which ensued upon the application of the Kohnyo claimant to include in its entry the ground in conflict with the placer, had been finally decided adversely to the applicant, *and had been closed by Commissioner's letter of June 27, 1898* (a copy of which does not appear in the record); that on June 14, 1898, there was filed in the General Land Office the paper designated Exhibit H, and that on June 17, 1898, the Kohnyo claimant filed the petition before mentioned, praying that it be allowed to patent under its then present application, the two detached portions of the Kohnyo claim for the reasons that a vein of mineral had been discovered and opened up in each end of

the Kohnyo claim and that it had been prevented by a conspiracy from developing the Southern end of its claim, and, therefore, had not had a fair opportunity to determine which end of its claim it would prefer to vacate; holding that in view of the fact that no motion for review of departmental decision of May 7, 1898 (Ex. G), affirming the Commissioner's decision of May 28, 1895 (Ex. A), was filed within the time prescribed by the rules of practice, the last mentioned decision (Ex. A) became final and that it then devolved upon the Commissioner's office to execute the same; and declaring the Kohnyo and Fortuna entry canceled as to the Kohnyo claim except the portion lying East (North) of the Mount Rosa placer and allowing the Kohnyo claimant sixty days from notice thereof to apply for an amended survey in accordance with decision of May 28, 1895, in default of which the entry would be canceled in its entirety.

Upon the day upon which this decision was rendered, July 15, 1898, Brown made an amended location of the Scorpion claim and on the following day, July 16, 1898, made a second amended location thereof, and on the same day Small located the P. G. lode claim.

Exhibit I (R., p. 52), is a decision of the Commissioner of the General Land Office under date of April 27, 1899, reciting that the Surveyor General had forwarded the field notes and plat of an amended survey of the Kohnyo and Fortuna claims, noticing a change in the location and direction of the lode line and the receipt of a protest by the claimant of the Hypatia lode claim averring that his rights would be interfered with by establishing the Southernly end line of the Kohnyo claim as returned in the amended survey, and allowing a hearing to determine

the true course and bearing of the Kohnyo lode. The decision also denied an application filed on April 10, 1899, by the Kohnyo claimant for the issuance of a patent for the Fortuna lode claim leaving the Kohnyo claim to be subsequently disposed of.

Exhibit J (R., p. 55), is a decision of the Commissioner of the General Land Office dated July 31, 1899, reciting that upon appeal from the decision of April 27, 1899 (Ex. I), the Secretary of the Interior rendered a decision June 3, 1899 (reported in 28 L. D., 451), permitting the Fortuna claim to go to patent as requested by the claimant, and allowing the Kohnyo claimant to commence proceedings for the reinstatement of the entry and directing that further action on the appeal be deferred until the question of the reinstatement of the Kohnyo entry as to the Southern portion of the Kohnyo location should be determined; that on July 18, 1899, the attorneys for the Kohnyo claimant filed a withdrawal of the appeal from the decision of April 27, 1899 (Ex. I), accompanied by a letter waiving all claim to right of reinstatement of the Southerly portion of the Kohnyo location and waiving all claim under the amended survey and conceding the course of the vein as given in the original location and survey, and applying for a further amended survey to establish the Southerly end line according to the course of the vein as given in the original location and survey; and concluding by allowing sixty days to apply for an amended survey in accordance with the decision of May 28, 1895 (Ex. A), or to appeal, in default of which the entry would be canceled as to the Kohnyo claim. This decision is the latest action of the Land Department exhibited in the stipulation.

Application for patent for the Scorpion claim was filed

June 19, 1899 (R., p. 23), Small filed his adverse claim on July 6, 1899 (R., p. 24), and Gurney filed his on July 17, 1899 (R., p. 24). It does not appear that an adverse claim was filed by the Kohnyo claimant.

Summons in this suit issued on September 16, 1899, and the stipulation as to facts appears to have been filed on June 15, 1901, when the case was submitted to the trial court.

Assuming for the sake of the argument that, as was held by the Supreme Court of the State, the Scorpion, Hobson's Choice and P. G. locations cover substantially the southerly 700 feet of the original Kohnyo claim and that the location and entry of, and issuance of a final certificate or receipt for, the Fortuna and Kohnyo claims are sufficiently established in the record, the questions that arise are,

First, whether the Fortuna-Kohnyo entry was valid as to said 700 feet tract and segregated that tract from the public domain;

Second, whether the entry of a mining claim upon application for patent prevents the initiation by location of rights which may be maintained in case the entry should be canceled, and,

Third, if such entry while it remains intact or uncanceled prevents the initiation of rights by location, at what stage in the proceedings in the matter of the Kohnyo entry the southerly 700 feet thereof became released therefrom and subject to relocation.

The supreme Court of the State, as appears by its opinion filed in the cause (R., p. 62), held that the Kohnyo location and entry prevented the initiation of rights by location,

that the southerly 700 feet of the Kohnyo claim became subject to relocation June 14, 1898, upon the filing in the General Land Office of the paper (Ex. H) signed by the president of the Cripple Creek Gold Mining Company, upon the theory that the filing of such paper was *ipso facto* an *extinguishment of the Kohnyo entry* as to the said 700 feet tract and *abandonment of possessory title* thereto, and that, therefore, the Hobson's Choice claim which was located on June 23, 1898, was superior in right as being the first located after the ground thus became subject to relocation; and reversed the trial court and entered judgment in favor of Gurney as against Brown and against both parties in the case of Small *v.* Brown.

Brown filed petitions for rehearing (R., pp. 70–74) which were denied (R., p. 74) and thereupon applied for writs of error to this court assigning the following errors (R., p. 75):

Assignment of Errors.

(1.) The said supreme court erred in over-ruling and setting aside the judgment of the trial court, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of its public mineral lands by the Department of the Interior, plaintiff in error was entitled to his judgment.

(2.) The said supreme court erred in directing judgment to be entered in said court against plaintiff in error and in favor of defendant in error, because, under the agreed statement of facts, and the laws of the United States relating to the control and disposition of the public mineral lands by the Department of the Interior, the defendant in

error was not, and is not, entitled to judgment against the plaintiff in error, or to recover the premises in controversy.

(3.) The said supreme court erred in not giving due force and effect to the decision of the Land Department of the Government of the United States, to wit:—the decision of the Commissioner of the General Land Office, dated May 28, 1895, which expressly declared that the right to the lode terminated where it intersected and passed within the exterior boundaries of the patented placer claim, which placer claim divided the lode claim into two separate and distinct tracts.

(4.) The said supreme court erred in construing and determining the decision of the Land Department of the Government of the United States, to wit:—the decision of May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands by the said Land Department, in such a manner as to hold that the southerly seven hundred (700) feet of the lode location in question, was a part of the Kohnyo claim, until June 14, 1898, and that the judgment of cancellation of May 28, 1895, did not become operative prior to June 14, 1898, and that such judgment of cancellation was not conclusive and binding upon the supreme court of Colorado.

(5.) The said supreme court erred in holding that under the decision of the General Land Office of date, May 28, 1895, and the statutes and laws of the United States relating to the sale and disposition of its mineral lands, the lode claimant ever had or could have any right, title or interest in the southerly seven hundred (700) feet of the Kohnyo claim, or right to enter same for patent, without first

making a discovery of mineral thereupon, and making proof of such discovery to the Land Department, together with proof of the statutory expenditure of five hundred ($500.00) dollars for the purpose of obtaining patent.

(6.) The said supreme court erred in holding that, upon the record in this case, the Kohnyo claimant was entitled to a conveyance of the said southerly tract, or to enter same in the United States Land Office for patent.

(7.) The said supreme court erred in not holding that under the judgment of the Land Department of May 28, 1895, the interest of the claimant in the said southerly tract—the premises in controversy in this suit—depended entirely upon the performance of conditions precedent, to-wit:—the discovery of mineral and the performance of five hundred ($500.00) dollars patent labor, and the failure to perform the conditions within the stated time, lost to claimant the right of selection mentioned in such judgment.

(8.) The said supreme court erred in not giving due and proper effect and consideration to the decision of the Department of the Interior, of May 28, 1895, which held that a lode claim, intersected by a patented placer, cannot be allowed to include ground, not contiguous to that containing the discovery, and that the right to the lode claim in question, terminated where it intersected and passed within the exterior boundaries of the patented placer claim; and erred, in not holding that such judgment and decision was binding upon the supreme court of Colorado.

(9.) The said supreme court erred in holding that the judgment of the Land Department, of May 28, 1895, was without force or effect until the Kohnyo claimant, by its

written declaration, filed in the local land office, indicated its intention to patent the *north tract*, which had always been recognized as valid and which contained the discovery workings of the claim.

(10.) The said supreme court erred, in holding that the act on the part of the Kohnyo claimant in filing the written declaration known as "Exhibit H" in the Land Office, was in and by itself alone, the means of determining—under the judgment of the Land Department of May 28, 1895—when the ground in controversy in this suit became public domain. And in holding that the rights of the parties to this litigation must be determined solely by the act of filing said written declaration of June 14, 1898, and not by the judgment of the Land Department.

(11.) The said supreme court erred in holding that under the statutes and laws governing the sale and disposition of the public mineral domain, and the control and power of the Department of the Interior over same, the judgment of the Land Department of May 28, 1895, was not, and could not be the means of canceling the Kohnyo entry upon the premises in controversy, until the said Kohnyo claimant filed in the local land office the instrument known as "Exhibit H;" and in virtually holding that said judgment was without force or effect until more than three years after it was rendered.

(12.) The said supreme court erred in holding that the premises in controversy in this suit, did not revert to the public domain, and was not a part of the public domain until June 14, 1898, when the Kohnyo claimant filed "Exhibit H" in the local land office.

(13.) The said supreme court erred in holding that the said decision of the Land Department, of May 28, 1895, was not a judgment of cancellation, as to the premises in controversy in this suit.

(14.) The said supreme court erred in holding that the judgment of May 28, 1895, of the Land Department of the Government did not—as to the premises in controversy in this suit—become final sixty (60) days after same was rendered, and thereupon, become conclusive and binding upon the Kohnyo claimant and upon the courts.

(15.) The said supreme court erred in holding that the judgment of the Land Department of May 28, 1895, which allowed the claimant sixty (60) days in which to furnish the required evidence, or to appeal—in default of which, the entry would be canceled to the extent of the premises in controversy—did not become a final judgment upon the failure of the claimant to either appeal or furnish the evidence required; and in holding that under the said judgment, the land did not—at the end of said sixty (60) days' time (there being no appeal or proofs furnished)—become subject to location and entry by the first legal applicant.

(16.) The said supreme court erred in holding, that under the statutes and laws of the United States relating to its mineral lands, and the control, sale and disposition of same by the Department of the Interior, the premises in controversy *was* not public mineral domain, and subject to location by plaintiff in error, on May 13, 1898, when he located his Scorpion Lode claim.

(17.) The said supreme court erred in not affirming

the judgment of the trial court, giving to plaintiff in error, his rights under the statutes and laws of the United States, as first legal locator and applicant for the mineral premises in controversy.

Points and Argument.

I.

The stipulation contains no evidence upon the question of whether or not the land in question was vacant or unappropriated and subject to location.

This, as we have shown, results, first, from *the failure of the parties to stipulate that the three conflicting locations in question cover the Southerly part of the Kohnyo location.* The acceptance of the application of Brown by the local officers is evidence that the land was unappropriated and subject to entry, but even in the absence of evidence the presumption must be that land in the so-called public land States has remained unappropriated (Lockhart *v.* Johnson, 181 U. S., 516); and, therefore, Brown, being prior in time, must be held to be paramount in right of possession.

Again, *there is no competent evidence of the existence of the Kohnyo location or the fact that entry of the same had been made.*

The stipulation merely introduces copies of land department decisions with the statement in each case "That on ..... the ..... rendered a decision of which a certified copy is hereto attached and marked Exhibit ....."

The proper proof of a mineral entry would be the full record of the application and final receipt accompanied by

the survey so as to fix the locus. Culver *v.* Uthe, 133 U. S., 655. And proper proof of a mining location, embraces evidence of discovery, etc., location notice, certificate of location and assessment work.

Recitals in departmental decisions are mere hearsay and the decisions themselves are evidence only that the officer rendering them signed such papers on the day of the date thereof. Sabariego *v.* Maverick, 124 U. S., 261.

And the paper, Exhibit H, filed on June 14, 1898, is not evidence of anything except that such a paper was filed in the General Land Office.

II.

The identity of the ground in question with the Southerly part of the Kohnyo location and the existence of the Kohnyo location and entry cannot be established by concessum of counsel on appeal or by any permissible legal inference from the record.

The office of the appellate court is to review the judgment of the trial court upon the record and error must affirmatively appear before there can be a reversal.

The principle "that questions sought to be reviewed shall first be brought to the attention of the trial court," has no application, for the appellant here was appellee in the court below and was not seeking to have the decision of the trial court reviewed, but merely insisting that *upon the record* the decision of the lower court was right.

Nor does the doctrine of estoppel apply. The appellant here was not seeking to raise any questions in the State Supreme Court, but insisting that the questions sought to be argued by the appellant were not presented by the record. There are proper cases where an *appellant* is

estopped on appeal from objecting that facts necessary to *support the judgment* were not proved, but here, on the contrary, Gurney as appellant in the court below sought to set up facts not shown by the record, but necessary as the foundation of his attack upon the judgment of the trial court.

That a missing fact cannot be supplied by concessum of counsel in the appellate court seems too elementary for argument and the ruling of the court below on this question is surprising in view of the previous decisions of the same court.

In Pueblo *v.* Robinson (12 Colo., 593, 599), it was said:

"By the agreed statement of facts it does not affirmatively appear that the lots on the east side of Santa Fe avenue were exempted from assessment, because the side of such lots abutted on the sewer without deriving any benefit therefrom, *though the argument of counsel for appellees virtually concedes that the exempted lots do abut laterally.* Neither does it appear whether the lots assessed were of substantially uniform depth or otherwise. In view of the fact, however, that appellees in applying for the injunction *assume substantially the affirmative of the issue*, we must, where the agreed statement is silent, resolve mere questions of fact against them."

See also Parker *v.* People, 7 Colo. App., 56, 58.
Reddicker *v.* Lavinsky, 3 Colo. App., 159-161.
Martin *v.* Force, 3 Colo., 199-200.
Evans *v.* Young, 10 Colo., 316-324, 5.
Leach *v.* Lothian, 10 Colo., 439.
Parkison *v.* Boddiker, 10 Colo., 503-513.
Schwed *v.* Robson, 12 Colo., 400-401.
Parker *v.* People, 13 Colo., 155.
Empire Land & Canal Co. *v.* Engley, 14 Colo., 289.
Townsend *v.* Fulton Co., 17 Colo., 145.

This court has never permitted concessum of counsel to supply deficiencies in the record.

In Zadig *v.* Baldwin, 166 U. S., 485, the point was whether a federal question appeared in the record. but the language of the court is equally applicable here. Mr. Justice White said:

"The contention that there was a Federal question raised below finds its only support in the fact that there has been printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state in which such a Federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court of California a claim under the Federal Constitution was presented. But, manifestly, the matters referred to form no part of the record and are not adequate to create a Federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state."

III.

The pendency of a mineral entry does not prevent location by another of the ground covered thereby, and such location becomes effective if the entry be canceled or relinquished and the possessory title forfeited or abandoned.

The appellee Gurney's contention is that Brown's location was made while the Kohnyo location and entry were subsisting and that his own location was made after the Kohnyo location and entry had been eliminated as to the ground in question.

If, however, the point we now make be sustained, it is immaterial when the Kohnyo entry was canceled or relinquished; but assuming, for the sake of the argument, that, as contended by Gurney, the Kohnyo entry was subsisting when Brown's original location was made and was thereafter, and before Gurney's location, relinquished and such relinquishment was as effective as formal cancellation, the case is similar to the recent case of Lavagnino *v.* Uhlig (198 U. S., 443) in all respects except that the senior claim in that case was only a possessory title while here it had reached the stage of entry. There the locator third in time sought to defeat the second by showing that the second location was made while the first remained valid, while here Gurney seeks to defeat Brown by setting up the Kohnyo location and *entry* as subsisting when Brown's original location was made.

The principle and reasoning of the Uhlig case, however, apply here with equal force. There Mr. Justice White said:

"The question then is, where there was a conflict of boundaries between a senior and junior location, and the senior location has been forfeited, has the person who made the relocation of such forfeited claim the right, in adverse proceedings, to assail the title of the junior locator in respect to the conflict area which had previously existed between that location and the abandoned or forfeited claim?

"To say that the relocator had such right involves, necessarily, deciding that, as to the area in conflict between the junior and the senior locations, the junior could acquire no present or eventual right whatever, and that, on the abandonment or forfeiture of the senior claim, the area in conflict became, without qualification, a part of the public domain. In other words, the proposition must come to

this: that as the junior locator had acquired no right whatever, present or possible, by his prior location, as to the conflicting area, he would be obliged, in order to obtain a patent for such area, to initiate in respect thereto a new right, accompanied with a performance of those acts which the statute renders necessary to make a location of a mining claim.

"The deductions just stated are essential to sustain the right of the relocator of a forfeited mining claim to contest a location existing at the time of the relocation, on the ground that such existing location embraced an area which was included in the forfeited and alleged senior location, for the following reasons: If the land in dispute between the two locations, which antedated the relocation, did not, on the forfeiture of the senior of the two locations, become unqualifiedly a part of the public domain, then the right of the junior of the two would be operative upon the area in conflict on a forfeiture of the senior location. If it had that effect it necessarily was prior and paramount to the right acquired by a relocation of the forfeited claim.

"But we do not think that the deductions which we have said are essential to sustain the right of the relocator to adverse, under the circumstances stated, can be sustained consistently with the legislation of Congress in relation to mining claims. Indeed, we think such a construction would abrogate the provisions of Sec. 2326 of the Revised Statutes, which is as follows:

" 'Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question

of the right of possession and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever.'

"This section plainly recognizes that one who, pursuant to other provisions of the Revised Statutes, has initiated a right to a mining claim, has recorded his location notice, and performed the other acts made necessary to entitle to a patent, and who makes application for the patent, publishing the statutory notice, will be entitled to a patent for the land embraced in the location notice, unless adverse rights are set up in the mode provided in the section. Thus clearly providing that if there be a senior locator possessed of paramount rights in the mineral lands for

which a patent is sought, he may abandon such rights and cause them in effect to inure to the benefit of the applicant for a patent by failure to adverse, or, after adversing, by failure to prosecute such adverse.

"It cannot be denied that under Sec. 2326, if, before abandonment or forfeiture of the Levi P. claim, the owners of the Uhlig locations had applied for a patent, and the owners of the Levi P. had not adversed the application, upon an establishment of a prima facie right in the owners of the Uhlig claims, an indisputable presumption would have arisen that no conflict claims existed to the premises described in the location notice. *Gwillim v. Donnellan*, 115 U. S., 45, 51, 29 L. Ed., 348, 350, 5 Sup. Ct. Rep., 1110. And the same result would have arisen had the owner of the Levi P. adversed the application for a patent based upon the Uhlig locations, and failed to prosecute, and waived such adverse claim.

"In both of the supposed instances the necessary consequence would have been to conclusively determine in favor of the applicant, so far as the rights of third persons were concerned, that the land was not unoccupied public land of the United States, but, on the contrary, as to such persons, from the time of the location by the applicant for the patent, was land embraced within such location, and not subject to be acquired by another person. And this result, flowing from the failure of the owner of a subsisting senior location to adverse an application for patent by the owner of an opposing location, or his waiver, if an adverse claim is made, must, as the greater includes the lesser, also arise from the forfeiture of the claim of the senior locator before an application for patent is made by the conflicting locator, and the consequent impossibility of the senior locator to successfully adverse after the forfeiture is complete.

"Of course the effect of the construction which we have thus given to Sec. 2326 of the Revised Statutes is to cause the provisions of that section to qualify sections 2319 and 2324 (U. S. Comp. Stat. 1901, pp. 1424, 1426),

thereby preventing mineral lands of the United States which have been the subject of conflicting locations from becoming, *quoad* the claims of third parties, unoccupied mineral lands by the mere forfeiture of one of such locations."

It is elementary that possessory title to a mining claim is acquired by discovery and location entirely aside from any proceedings in the local land office or the Land Department, that possessory title may be maintained indefinitely, and that patent proceedings, the object of which is the acquisition of the fee, are separate and distinct from the acquisition and maintenance of possessory title.

Location proceedings and patent proceedings are separate and distinct, and application for patent and entry do not affect the status of the ground, so far as possessory title is concerned, *unless patent finally issue* and, by relation back, cut out any intervening claims. If the patent proceedings prove abortive and the entry be canceled there can be no relation back, and it follows that the force and effect of the certificate of purchase is destroyed. In such case, as recognized in Clipper Mining Company *v.* Eli Mining and Land Company (194 U. S., 220, 226), the applicant is relegated to his possessory title, and it logically follows that such possessory title, in order to remain valid, must have been supported by the necessary acts in the interim.

The statute, R. S. U. S., Sec. 2324, provides that—

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, *and until a patent has been issued therefor*, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year; * * * *and upon a failure to comply*

with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made. * * *"

It necessarily follows from this provision that application for mineral patent does not segregate the land from the public domain so as *ipso facto* to prevent relocation of the claim and, inasmuch as annual assessment work is required *until patent issues*, it also follows that only patent proceedings culminating in the issuance of patent can cure failure to perform requisite annual work in the interim, and a relocation for forfeiture even after entry must prevail unless patent actually issue.

The conclusion is that in the case of mineral land there is an exception to the general rule applying to land office proceedings and that possessory rights to mining claims may be acquired and maintained irrespective of patent proceedings unless such proceedings culminate in the issuance of patent.

In view of Section 2324 the Land Department recognizes that an applicant for mineral patent may lose his possessory title by forfeiture after application and before making entry and in early cases, even after entry, upon protest setting up relocation for forfeiture, a hearing was ordered and, if it appeared that there was reasonable ground for the relocation, the entry was canceled and the applicant relegated to his possessory title in order that the controversy as to right of possession might be determined by the courts. Little Pauline and Leadville Lodes, 7 L. D., 506; Sweeney *v.* Wilson, 10 L. D., 157.

In later cases the Department has held that mere lapse of time between application and entry justifies cancellation

of the entry without a hearing, saying in Cain *v.* Addenda Mining Company (29 L. D., 62):

"The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed; otherwise by making application for patent and giving notice thereof, but without making payment of the purchase price one would become entitled to project, indefinitely into the future, the assumption of Section 2325 'that no adverse claim exists' notwithstanding the requirement of Section 2324 that an expenditure of one hundred dollars in labor or improvements should be made upon a mining claim during each year until entry is allowed."

and holding that failure of the applicant to prosecute to completion its application within a reasonable time after publication and after the termination of adverse proceedings in the courts (which had intervened in that case), constituted a waiver of all rights acquired by the earlier proceedings upon the application.

And in P. Wolenberg *et al.* (29 L. D., 302) the Secretary said (p. 305):

"In this case nearly two years elapsed after the required publication before any effort was made to carry the application to completion, and in the meantime there may have been, as claimed, a legal relocation of the claim, based upon a failure by the claimants to make the annual expenditure in labor or improvements which is necessary to the continued maintenance of their possessory right as against subsequent locators. The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the

time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication. The statutory declaration does not compel any assumption in this instance to the effect that no adverse claim intervened between the earlier proceedings upon the application for patent, which ended February 3, 1897, and the making of the entry on December 21, 1898. In the presence of the claimed relocation of the Mascot after the expiration of the period of publication, the applicants for patent are not in a position to ask or urge that their laches or delay be disregarded. It follows that the entry must be canceled. The applicants will be at liberly to renew proceedings for patent if they so desire, and Christy will have opportunity to present, for determination by the proper tribunal, his claim under his alleged relocation.

The decision of your office ordering a hearing upon said protest is therefore vacated, and the matter will be disposed of by your office in accordance with the views herein expressed."

The applicants in that case compromised with the protestant and secured withdrawal of the protest, yet the Secretary upon review (29 L. D., 488) held that the same result followed even in the absence of protest, saying (p. 490):

" It was stated in the former decision that in the presence of the asserted relocation of the Mascot claim, the applicants for patent were not in a position to urge that their laches or delay be disregarded. The subsequent compromise with the protestant, whereby the withdrawal of his protest was secured, does not place them in such a position in this respect as requires the Department now to disregard

their laches and delay. It is not believed that the facts of this case would justify such a course, or that good administration would be promoted thereby. Before the entry of the Mascot and Pennsylvania claims others than Christy may have made relocations of all or portions thereof on account of the alleged failure of Wolenberg *et al.* to do the required annual assessment work, and the only method prescribed for giving notice to and protecting the rights of any such relocator is that set forth in sections 2325 and 2326 of the Revised Statutes. Barklage *et al. v.* Russell, 29 L. D.. 401; Brady's Mortgagee *v.* Harris *et al.*, Ibid, 426"

See also Lucky Find Placer, 32 L. D., 200; Adams *v.* Polglase, Id. 477.

And in any case if patent proceedings are found defective and the right to patent is found not to exist, the entry is canceled, and the applicant required to republish, because in such case the ground must, under Sec. 2324, remain subject to relocation "until a patent has been issued therefor."

In his latest decision upon this point (Jaw Bone Lode *v.* Damon Placer, 34 L. D., 72, at 76) the Secretary said:

"An application for mineral patent which has thus been rejected may, then, unless in itself or for any extrinsic reason fatally defective, be made the instrument of renewed patent proceedings. In any such case, however, it must be treated as refiled (and should be so endorsed by the register), and as again taking effect, as of the date formal application is made to that officer for republication of notice thereof, which must in all cases be promptly had. Where in any case that date can not afterwards be ascertained the application must of necessity be held to have taken renewed effect as of the date of the first publication of the new notice."

These considerations lend special significance to the proviso inserted in all certificates of mineral entry pursuant to paragraph 52 of the United States Mining Regulations, which reads:

"Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, *after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.*"

The prescribed official form of certificate is, as follows:

[4—201.]

N.

REGISTER'S FINAL CERTIFICATE OF ENTRY.

MINERAL ENTRY	UNITED STATES LAND OFFICE
No.....	at.....
LOT No.....	....., 1 .

It is hereby certified that in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two and legislation supplemental thereto .....

whose Post-office address is.....,

on this day purchased that *Mining Claim* known as the .....

..... Section ..., in Township No. .....
.....of Range No. ..... meridian, designated as Lot ..... No. ..... said Lot No. ..... extending .....
_____ .....feet in length along said .....vein or lode, *expressly excepting and excluding* from said purchase all that portion of the ground embraced in mining claim .....or survey ..... designated as Lot ..... No. .....
and also all that portion of any vein or lode the top or apex of which lies inside of said excluded ground; said Lode .....claim, as entered, embracing .....
.....acres, and said Mill-Site claim .....acres, in the .....Mining District, in the County of ..... and ..... of .....
as shown by the plat and field-notes of survey thereof, for which the said part ..... first above named this day made payment to the Receiver in full, amounting to the sum of .....dollars.

NOW, THEREFORE, be it known that upon the presentation of this Certificate to the *Commissioner of the General Land Office*, together with the plat and field-notes of survey of said claim and the proofs required by law, a Patent shall issue thereupon to the said .....

.....

if all be found regular.

.....

Register.

The statutes by which the regulation quoted is sanctioned are sections 2325, 2326 and 2328 governing the patenting of lode claims.

Section 2325 concludes:

"If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326, covering adverse claims and suits, provides, *inter alia:*

"After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper

fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights.

Section 2328 provides, *inter alia*:

"Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land Office."

It will thus be seen that the certificate of entry (or purchase) is in reality only provisional, entitling to patent in case "all be found regular" by the Commissioner of the General Land Office.

Comparison with the regulations under the forest lieu selection law, considered by this court in Cosmos Exploration Co. *v.* Gray Eagle Oil Co., 190 U. S., 301, 315, shows that the procedure in the two cases is equivalent in the respect that the function of the local officers is merely to permit the applicant to make payment and forward the complete record to the Commissioner for examination, and the ruling of the court in that case would seem to also apply to the case of mineral entry and support our contention that certificate of entry in such case, so far as preventing acquisition of possessory title is concerned, is effective only in case the right to patent exists, *i. e.*, "all be found regular," and patent does subsequently issue.

In the Cosmos case this court said:

"Among the rules it is provided:

"'16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to

execute a quit-claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the Government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for.

"'18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for.'

"The 'consideration,' mentioned in rule 18, is clearly not of the character of a review of a decision already made by the local land officers, but is in the nature of an original consideration of the subject by the General Land Office, to which office the final decision belongs. The *applications* are to be forwarded, not a decision by the local land office, together with a report (not a decision) as to the status of the land. This rule makes it the duty of the local land officers merely to forward the various applications to the General Land Office, and an original decision is to be made by the latter office upon the papers transmitted to it."

* * * * * * *

"But, as has already been stated, there is nothing in the statute of 1897 which gives the local land officers the right to decide whether the selector has complied with the provisions of the act, and unless those officers had that power they did not acquire it by assuming to exercise it. We do not say they did so assume. They received, accepted and filed the deed, the abstract of title, the non-mineral affidavit and the selection as made by Clarke. They entered that selection upon the official records of the land office and they certified that it was free from conflict, and that there was no adverse filing, entry, or claim thereto, but it can not be said that they decided that the selector had complied with the provisions of the statute or that he had done

all that he ought to have done in order to acquire his alleged complete, equitable title."

* * * * * * *

"Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it."

In the same case this court, recognizing the doctrine of relation back, said:

"It may be that when the decision of the land department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when a patent subsequently issues the legal title will vest from the time of selection."

In Benson M. & S. Company *v.* Alta M. & S. Company (145 U. S., 428) it was held that after entry the applicant for patent for a mining claim is not obliged to continue

annual assessment work, and that a relocation by another under claim of forfeiture for failure to perform such work pending the patent proceedings was ineffectual. *There, however, patent actually issued.* The point decided was that the patent related back and all that the court say, *arguendo,* is based upon the assumption that "the right to the patent exists," a condition which is also attached to the language quoted from previous cases.

The court is now confronted with the case where the right to patent did not exist and patent was refused and the entry canceled, or, as claimed by Gurney, relinquished.

The question of a relocation pending adjudication of a mineral entry subsequently canceled was before the Supreme Court of Montana in Murray *v.* Polglase, 23 Montana, 401; 59 Pac. Rep., 439 (1899), and that court in a carefully considered opinion reviewed the decisions upon the force and effect of a receiver's certificate of mineral entry, drew the distinction we have suggested, and sustained the present contention. The argument of the court is so complete and convincing that we venture to quote from it at some length:

"It is conceded on both sides that when a locator, having complied with the law, in good faith completes his proof and pays the purchase money, his equitable title is complete. The conditions are then all performed, and no further obligation rests upon the applicant to expend money in doing the annual representation work. Even if the patent is delayed for any reason, still when it is finally issued it is evidence of the regularity of all previous acts, and relates back to the date of the original entry, so as to cut off intervening rights. Indeed, the decisions are uniform on this question wherever it has been considered. Deno *v.* Griffin, 20 Nev. 249, 20 Pac. 308; Aurora

Hill Consol. Min. Co. *v.* 85 Min. Co. (C. C.) 34 Fed. 515; Benson Mining & Smelting Co. *v.* Alta Mining & Smelting Co. 145 U. S., 428, 12 Sup. Ct. 877, 37 L. Ed. 762; Barringer & A. Mines & Min. 265; In re Harrison, 2 Land Dec. Dep. Int. 767. But we have not been able to find any adjudicated case upon the exact question presented here. Counsel have cited none, and we therefore conclude that there is none. This fact, however, is to be noted: That in all the cases cited, except those arising out of railroad grants, the presumption has obtained that the entry in question was made in good faith, and in each one of them the entry was a subsisting one at the time the controversy arose. Counsel for defendants have cited U. S. *v.* Steenerson, 1 C. C. A. 552, 50 Fed. 504. In that case one Hanson had made a pre-emption entry upon public land, and on November 1, 1884, made his final proof, and received a certificate of purchase. He at once conveyed the land to Steenerson, one of the defendants. During the winter of 1885-1886 the firm with which Steenerson was associated cut from the land 754,000 feet of logs, and had them in their possession. In April, 1886, the United States brought suit in replevin to recover the logs, claiming that the title to the land, and therefore to the timber, had not vested under the entry, on account of fraud practiced by Hanson in making it. During the pendency of the suit, and before the trial, the entry was canceled by the Commissioner of the land office on the ground that the entry was not made in good faith for actual settlement, but for the purpose of enabling Steenerson and his associates to strip the land of the timber thereon. The Circuit court of appeals sustained the action. We quote from the opinion by Judge Shiras: 'The final certificates or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms, nor in legal effect, a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the

United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that, by performance on his part of the requisite acts, he has become the equitable owner of the land, and that the United States holds the legal title in trust for him; but as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance, on his part, of the acts which, when done, entitle him, under the law, to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant, it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist.' The case is not in point upon the question here considered, but it is suggestive, in that the court emphasizes the necessity resting upon the entryman to perform in good faith all the conditions required by law before he makes the entry. These are conditions precedent, and without the performance of them in good faith no title vests. The cancellation of plaintiffs' receipt adjudicated the fact that they obtained no title at all by their entry. By this judgment of the authorities of the land office they were deprived of the ability to claim any rights under it. They were left with just such rights as they had at the time they obtained it. If they chose to rely upon it as evidence of their title, and then forbore to preserve their rights by doing the acts necessary to preserve them, they are not now in a position to assert that they have lost nothing. They

stand in the same position as they would have stood on January 1, 1888, if they had not obtained the receipt at all. They cannot be heard to say that during the time the receipt was outstanding the land was withdrawn from the mass of public lands, and that defendants acquired no rights under their location. Plaintiff's rights were forfeited, and the Maud S. claim was subject to relocation, at the time the Ramsdell claim was located. To hold otherwise would be to lend assistance to the fraud attempted by plaintiffs, and which would have been successful but for its exposure made by defendants and their predecessors. It would permit them to profit by their own misconduct, in violation of the principle expressed in the wholesale maxim, '*Nemo allegans suam turpitudinem est audiendus.*'"

The same case came before the Land Department (Adams *v.* Polglase, 32 L. D., 477), and the Secretary said:

"It is contended by the protestants, in substance, that the location upon which the Ramsdell application is based is absolutely void because made upon land at that time segregated from the public domain by the then-subsisting Maud S. entry.

"The Maud S. entry was canceled by the Land Department, as the result of the proceedings had on the protest filed by the Ramsdell lode claimants, on the ground that an expenditure of the value of $500 in labor or improvements had never been made upon or for the benefit of the Maud S. claim, as required by section 2325 of the Revised Statutes. Compliance with this requirement of the statute prior to the expiration of the period of publication is an indispensable prerequisite to entry and patent, and without such compliance there can be no valid entry. It may be conceded, however, that while the Maud S. entry stood uncanceled of record, the lands covered thereby were not properly subject to location. But when that entry was canceled, the lands from such date became subject to loca-

tion, and the prior location by the Ramsdell lode claimants became from such time effective, if rights thereunder were then being, and were thereafter asserted according to the mining law. On this question there does not seem to be any doubt. See Noonan *v.* The Caledonia Gold Mining Company (121 U. S., 393)."

Upon review (33 L. D., 30), the Secretary said:

"It is urged in support of the motion for review, among other things, in substance and effect, that it was error to cite the case of Noonan *v.* Caledonia Gold Mining Company, *supra*, as authority for the holding above quoted, in view of the later decision of the Supreme Court of the United States in the case of Kendall *v.* San Juan Mining Company (144 U.S., 658), citing and explaining the Noonan decision, for the reason that the Ramsdell lode claimants did not make a new location or re-record notice of their old location after the cancellation of the Maud S. entry and prior to the location made by protestants.

"Both the Noonan and the Kendall case, *supra*, involved mining locations made upon lands embraced within Indian reservations, and at such time not subject to the mining laws, which subsequently, upon extinguishment of the Indian reservations, became subject to the operation of said laws. The land here involved was not embraced within any Indian reservation, but was public land of the United States subject to the mining laws, although, at the time the location in question was made, covered by an invalid mineral entry. The Noonan case was cited in the decision sought to be reviewed only for the reason that the holding therein is in line with the long-established ruling of the Department, in cases similar to the present one, to the effect that mining locations or entries under the public land laws, made upon lands not at the time regularly subject thereto, may nevertheless, if maintained in good faith, and the land subsequently becomes subject to such location or entry, be permitted to remain intact, as having attached

on such date, if at that time there be no adverse claim. (See Rob Roy lode, 1 Brainard, 173; Dobbs Placer Mine, 1 L. D., 565, 568; Gunnison Crystal Mining Co., 2 L. D., 722, 724–5; Myer *et al. v.* Hyman, 7 L. D., 336; Moss Rose Lode, 11 L. D., 120; Colomokas Gold Mining Co., 28 L. D., 172, 174).

"There being no claim to the land here involved adverse to that of the Ramsdell lode claimants at the date of the cancellation of the Maud S. entry, the Department is of opinion that the holding in the cases cited is clearly applicable in the present case."

It will be observed that the Secretary declares the distinction between a location made upon land in reservation and one made upon ground covered by a mineral entry, viz: that in the one case the land is not at the time subject to the operation of the mineral laws, while in the other it is still subject to the operation of those laws, notwithstanding the subsisting entry, and, therefore, a location duly made before cancellation of the entry becomes valid upon such cancellation if the possessory title upon which entry was made fall for any reason.

It follows, therefore, that Brown's right is superior even under Gurney's contention that the Kohnyo entry, as to the south 700 feet thereof, was eliminated by the paper (Ex. H) filed in the General Land Office on June 14, 1898, for it is admitted that Brown was then and thereafter in possession and had theretofore performed, and continued thereafter to perform, all acts necessary to sustain a valid location, while Gurney did not initiate his claim until June 23, 1898, and Small did not initiate his until July 16, 1898.

IV.

Still admitting, for the sake of the argument, Gurney's contention as to the time of elimination of the Kohnyo entry as to the ground in question, Brown's rights are yet superior even under the doctrine of Noonan v. Caledonia Gold Mining Company and Kendall v. San Juan Mining Company, supra, if applicable, for on July 15 and 16, 1890, he made amended locations of the Scorpion claim and filed amended or additional certificates (R., p. 20).

The Colorado Statute (2 Mills. Ann. Stat., 1891, section 3150), provides:

The discoverer of a lode shall, *within three months from the date of discovery*, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate which shall contain:

First—The name of the lode.

Second—The name of the locator.

Third—The date of location,

Fourth—The number of feet in length claimed on each side of the center of discovery shaft.

Fifth—The general course of the lode as near as may be. (L. 74, p. 186, Sec. 3; G. L., '77, pp. 629, 630, Sec. 1813; G. S., 983, p. 722, Sec. 2399.)

Also (Ibid Sec. 3160):

If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an over-lapping claim

which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator, or his assigns, may file an additional certificate, subject to the provisions of this act; *Provided*, That such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location. (L. '74, pp. 188, 189, Sec. 13; G. L. '77, pp. 631, 632, Sec. 1823; G. S. '83, pp. 724, 725, Sec. 2409.)

These considerations seem to render it unnecessary, so far as Gurney's status is concerned, to consider whether the Kohnyo entry as to the 700 feet in question was valid or, if valid, when, as a matter of law, was eliminated; but, if it be necessary to enter into a discussion of those questions we contend, first, that

V.

The Kohnyo entry, upon the face of the application papers, was illegal and void as to the Southerly 700 feet thereof and did not operate to segregate that tract from the public domain.

[The argument under this and following points is based upon the contingency that the exhibits of decisions of the Land Department may be held to be sufficient evidence of facts recited therein as to the record of the Fortuna-Kohnyo application and entry, and in so treating such recitals we

in no wise relinquish our contention that so far as appears by the record the proceedings relating to the Kohnyo location and entry are irrelevant.]

It is elementary that the vein or lode is the principal thing in a mining location and the surface ground a mere incident.

"A mining claim * * * may equal but shall not exceed one thousand five hundred feet in length along the vein or lode." (R. S. U. S., Sec. 2320.)

The location can be valid only to the extent of the lode and if the lode terminates at a point within the location, the location beyond such point is invalid. Armstrong *v.* Lower (6 Colo.. 393, 581); Patterson *v.* Hitchcock (3 Colo., 533); Zollar *v.* Evans (5 Fed., 172).

It appears from recitals in the exhibits that the Kohnyo claim was located upon a discovery made in the tract north of the Mount Rosa placer and the location lines were run across the previously located placer and 700 feet beyond; that application for the placer was first made and, no protest or adverse being filed by the Kohnyo claimant, patent issued for the placer, including the area in conflict; that thereafter application was made for patent for the Fortuna and Kohnyo lodes, the area in conflict with the patented placer *being excluded in the application, publication and entry* (R., p. 28): and that the discovery and all improvements made by the Kohnyo claimant were upon the northerly tract with no showing that the lode had been discovered in the placer or in the Southerly tract. Under such circumstances the allowance of entry for the Kohnyo *lode*, including the Southerly 700 feet segregated from the discovery by the patented placer, was clearly unwarranted and upon the face of the application papers the

entry was necessarily invalid as to that Southerly 700 feet tract, and the Commissioner of the General Land Office promptly so held (Ex. A, R., p. 24).

The Land Department holds that a location and entry may include tracts segregated by a patented millsite or agricultural entry, if it be shown that the applicant has discovered the lode in both of the segregated tracts, which doctrine would no doubt apply to a case of segregation by a placer; but in the absence of a showing of discovery by the applicant in the disconnected tract the location and entry can be valid only to the extent of the tract where discovery and improvements are shown.

It follows then that the Kohnyo entry was, upon the face of the application papers, invalid as to the southerly 700 feet tract, and had been so held by the decision of the Commissioner of May 28, 1895 (Ex. A, R., p. 24), which was declared by the Secretary in decision of June 3, 1898, 28 L. D., 451–454, *to have become final* by failure of the claimant to appeal.

[The effect of the proceedings in the Land Department subsequent to May 28, 1895, is considered hereinafter.]

VI.

The Kohnyo entry, as to the South 700 feet thereof, if not invalid, was eliminated at the expiration of sixty days from notice of Commissioner's decision of May 28, 1895 (Ex. A, R., p. 24), which was a direction to the local officers to cancel the Kohnyo entry as to the South 700 feet thereof upon default by the claimant in making election and furnishing evidence as therein allowed or taking appeal.

This decision was self-executing. No election pursuant thereto was made and no appeal therefrom taken within the time limited. It was a final adjudication that the Kohnyo claim was not valid as to the part thereof separated from the discovery shaft by the patented placer. It is to be presumed that the local officers promptly notified the claimant, yet no action was taken until August 14, 1895, when the local officers forwarded a petition asking that the claimant be allowed to make application for the area in conflict with the placer. It is to be presumed that in the meantime the local officers had noted the cancellation upon their register of mineral entries, though whether or not such entry was made is immaterial.

Notwithstanding the suggestion in Commissioner's decision of January 8, 1896 (Ex. C, R., p. 29) that, by office letter of September 16, 1895 (Ex. B, R., p. 25), the decision of May 28, 1895, was modified so as to allow a hearing to determine whether the Kohnyo lode was known within the placer at the time of placer application, the petition forwarded August 14, 1895, must be regarded as an application for reinstatement and amendment to include the area in conflict with the placer, and the decision of September 15, 1895, as the allowance of a hearing to establish the alleged fact upon which such application was based. That this was the view of the Department is evidenced by the language of the Secretary in decision of June 23, 1899 (28 L. D., 451):

"There was no appeal from the decision of your office dated May 28, 1895, holding that by reason of their noncontiguity the two parts of the Kohnyo claim could not be embraced in the entry, nor was the question as to the soundness of that decision raised in the appeal from your

office decision of October 22, 1897, nor was it considered by the Department in its decision of May 7, 1898. The question considered and decided in those decisions was whether the Kohnyo vein was known to exist in the ground in conflict between the Kohnyo and the Mount Rosa placer locations at the time of the placer application for patent, There is, therefore, nothing in the decision of May 7, 1898, which the Department is called upon to review. What is really presented by the petition in question is an application for the reinstatement of the said entry. The Department is, in effect, asked to overrule your office decision of May 28, 1895, and restore the entry to its original status. This would be an unusual proceeding, for which no warrant is found in the existing situation. An application for reinstatement of the said entry, if made at all, should be presented to your office."

In a similar case (Guillery *v.* Buller, 24 L. D., 209) the Secretary said:

"As heretofore shown, your office held that the land in question was reserved from entry until the filing of Vidrine's relinquishment on March 3, 1894. This was error. Any rights that Vidrine may have had, ceased upon his failure to appeal from your office decision of July 27, 1893, or to change his entry in accordance with the instruction contained therein. He had sixty days within which to comply with the terms of said decision. Upon his failure to do so, the said decision became a final judgment and the land thereby became subject to entry by the first legal applicant. Within that time and to that extent, your office was correct in holding that the land was not subject to entry and that applications made within that time should have been rejected. It will be observed that Guillory's application was filed September 1, 1893, which was prior to the expiration of the time allowed Vidrine by your office decision to exercise his alternative right of appeal or to change his entry, which said decision, did not

of necessity become a final judgment until the expiration of sixty days from the date it was rendered. Guillory never renewed his application. Buller's application was filed November 6, 1893, after the expiration of the sixty days, when the judgment of your office had become final, and the land thereby released from any rights Vidrine may have had, and subject to entry; hence the application of Buller to enter the land having been made after it became subject to entry, his rights are superior to those of Guillory."

* * * * * * *

"It has been determined that your decision of July 27, 1893, was a judgment of cancellation, which became final upon Vidrine's failure to appeal within the time allowed."

* * * * * * *

"In support of the holding that your office decision of July 27, 1893, was a judgment of cancellation, it will be observed that by said decision Vidrine was served with notice of what he might expect from your office. He was presented with the alternative of changing his adjoining farm entry to a settlement entry, to be followed by residence and cultivation sufficient to make a five years' showing; or in the event of his failure to do this, or to appeal from your said decision, he was informed that proper steps would be taken looking to the cancellation of his entry. Vidrine took no action. The language of your said office decision is construed to be equivalent to a judgment holding Vidrine's entry for cancellation, unless within sixty days from notice he should comply with the requirements contained in said decision."

"Decisions of the Commissioner not appealed from within the period prescribed, become final and the case will be regularly closed." (Rule of Practice, Land Department, 112.)

In Northern Pacific R. Co. *v.* DeLacey, 174 U. S., 622, this Court said :

"The filing of their declaratory statement and the record made in pursuance of that filing, became without legal value if within the time prescribed by the statutes proper proof and payment were not made. Whether such proof and payment were made, would be a matter of record and if they were not so made, the original claim was canceled by operation of law and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and canceled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or the cancellation. It is the provision of law which makes the forfeiture and the entries on the record are a mere acknowledgment of law and have in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancellation before it is to take effect. The expiration of time is the most effective cancellation."

These declarations of the rule of departmental practice seem to remove any doubt as to the finality of the decision of May 28, 1895, and demonstrate that the petition of August 14, 1895, was in effect an application for reinstatement and amendment,

Under the practice of the Land Department, as a matter of policy tending to regularity and avoidance of confusion, applications or entries by others, pending adjudication of an application for reinstatement, are not accepted or allowed; but before reinstatement of a mineral entry is permitted the applicant is required to republish so as to afford other claimants opportunity to file adverse claims and institute adverse suits, as is evidenced by the language of the Secretary in 28 L. D., following that quoted above (p. 454):

"It appearing that parties are claiming the ground covered by the canceled portion of the entry, adversely to the claim of the petitioner, and that such parties are entitled to be heard upon any application for the reinstatement of the entry, you are directed to advise the petitioner that your office will consider such application if filed in the local office within sixty days from notice hereof, provided notice of the application is published for the period of sixty days, commencing with the filing of the application, in the same manner as notice of original applications for patent is required to be published, and due proof of such notice is furnished."

And in such case the application for reinstatement takes effect as of the date formal application is made to the register of the local office for republication of notice

Upon this point the Secretary has recently said, as noticed before (Jaw Bone Lode *v.* Damon Placer, 34 L. D., 72, at 76):

"An application for mineral patent which has thus been rejected may, then, unless in itself or for any extrinsic reason fatally defective, be made the instrument of renewed patent proceedings. In any such case, however, it must be treated as refiled (and should be so endorsed by the register), and as again taking effect, as of the date formal application is made to that officer for republication of notice thereof, which must in all cases be promptly had. Where in any case that date can not afterwards be ascertained the application must of necessity be held to have taken renewed effect as of the date of the first publication of the new notice."

It is thus apparent that the land department recognizes the right of others to initiate rights by location pending an application for reinstatement of a mineral entry and makes provision for the protection of such rights by requiring the applicant, in case he show facts which, in the absence of

intervening adverse right, would entitle him to reinstatement of his entry, to republish notice or his application.

So, here, had the Kohnyo claimant established the basic fact of its application of August 14, 1895, for reinstatement and amendment, viz: The existence of the lode within the placer, the department would have required it to republish so as to give opportunity to claimants of intervening rights to adverse.

It follows, then, that the pendency of the contest with the Mount Rosa owner over the existence of the lode within the placer, could not under any theory prevent the initiation of possessory rights by location; and Gurney is estopped from insisting that an application for reinstatement reserves the land from mining location, for such contention applied to his main contention that the filing of Exhibit H eliminated the ground in question from the Kohnyo location and entry, would throw him out of court inasmuch as the petition filed June 17, 1898 (Ex. K, R., p. 58), asking to be allowed to patent both parts of the Kohnyo claim was in effect an application for reinstatemant (if the relinquishment was effective as he claims), and was pending when his location was made on June 23, 1898.

VII.

If it be held that the operation of the decision of May 28, 1895, was suspended by the proceedings upon the petition forwarded August 14, 1895, and the Kohnyo entry remained uneanceled pending those proceedings, such suspension was removed by the decision of the Secretary May 7, 1898 (Ex. G, R., p. 45), which finally disposed of the petition.

It is to be observed that the time limited in the decision of May 28, 1895, had long expired when the petition of August 14, 1895, was filed, so that that decision then stood as a judgment of cancellation and the suspension, if any, could only apply to the actual entry of cancellation upon the records, if such entry had not already been made. Under the rules of the Land Department a decision takes effect at once and is not in suspense pending the time for appeal or review and during such time entries are received subject to the right of appeal or review. Instructions, 3 L. D., 119: John H. Reed, 6 L. D., 563; Henry Gauger, 10 L. D., 221; Thomas *v.* Rathbun, 12 L. D., 243; Perrot *v.* Connick, 13 L. D., 598; Vradenburg *v.* Orr, 16 L. D., 35.

No motion for review of the decision of May 7, 1898, having been filed, it follows that that decision was final and continued effective from the time it was rendered.

As the time limited in Commissioner's decision of May 28, 1895, had expired, final action by the Secretary could not operate to start a new period of sixty days at the expiration of which cancellation would become effective.

VIII.

If the Kohnyo entry as to the Southerly 700 feet be held to have remained subsisting after May 7, 1898, it was not eliminated by the paper (Ex. H, R., p. 51), filed June 14, 1898.

We base this contention upon five grounds:

First. A mineral entry is not eliminated by the filing of a relinquishment.

This was the law with respect to all classes of entries

prior to the act of May 14, 1880 (21 Stat., 140). In cases of relinquishment, if acceptable to the Department, the entry was canceled by formal order. See, for illustration, Circular of May 3, 1876, 3 Copp's Land Owner, 38; Sherman *v.* Atkins, 4 Ibid. 21; Barrett *v.* Maybury, 4 Ibid. 77.

The act of 1880, entitled "An Act for the relief of Settlers on public lands," recognized the inconvenience of the delay in departmental routine between filing of relinguishment and cancellation pursuant thereto, in preemption, homestead and timber culture cases, and provided:

"That when a *preemption homestead, or timber culture* claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

We cite this statute as evidence that Congress recognized the law as enforced in the land department and saw fit to modify it only with respect to settlement entries, leaving it still in force otherwise. And that this rule was applied to the Kohnyo entry is evidenced by the fact that the Commissioner ignored the paper in question and by letter of June 27, 1898, (R., p. 58) closed the case and then proceeded to cancel the Kohnyo entry as to the Southerly 700 feet thereof by way of execution of the decision of May 28, 1895, and the Secretary in decision of June 3, 1899, 28 L. D., 451, at page 454, refers to the Kohnyo entry as *canceled* as to the said Southerly tract thereof.

A mineral entry, if regarded as a concluded transaction

and transfer of the equitable title (which is essential to Gurney's contention) is in effect a contract of purchase and sale whereby the government receives the price of its land and issues to the purchaser a certificate entitling him to patent if all be found regular.

It is too elementary for argument that in such case the purchaser cannot rescind the transaction and entitle himself to repayment of his purchase money without the acquiescence of the seller.

A relinquishment, therefore, can be no more than an offer of, or request for, rescision of the sale, and such rescision, if agreeable to the land department, is evidenced and effected by formal cancellation of the entry.

Second. The said paper (Ex. H.) was not the act of the corporation claimant.

It is elementary that the president of a corporation has no power to relinquish or quit claim property rights of the corporation and that such a relinquishment must be evidenced, at least, by the corporate seal, if not by a resolution of the Board of Directors. It is also elementary that agency cannot be established by declarations of the alleged agent. So far as appears in the paper itself or elsewhere in the record, this paper was the individual act of Lyman B. Goff, who claims to be the duly empowered president of the corporation. But there is no evidence of his official character or that he was empowered to make such relinquishment. On the contrary, it appears that three days later the attorneys of record for the company filed a petition still insisting upon the right to patent the South 700 feet of the Kohnyo claim and asking that action upon the paper filed June 14, 1898, be suspended.

Rule 104 of the Rules of Practice of the Land Department provides:

"In all cases, contested or *ex parte*, where the parties in interest are represented by attorneys, such attorneys will be recognized as fully controlling the cases of their respective clients."

Third. The paper in question is not in terms or effect a relinquishment, but merely a waiver of the right to apply for review of the Secretary's decision of May 7, 1898

As we have shown, a decision of the Land Department is not suspended during the period for filing motion for review and, therefore, the decision of May 7, 1898, was effective from its rendition and waiver of the right to apply for review could in no wise perform any function in giving that decision force.

Nor was there, with respect to the 700 feet tract, anything to relinquish. The decision of May 28, 1895, became final by failure to appeal and the Secretary's decision of May 7, 1898, foreclosed the effort to reinstate and amend.

On June 14, 1898, therefore, the Kohnyo claimant had no right to patent for the said 700 feet tract which it could relinquish, but the entry stood finally adjudicated invalid as to that tract and there was nothing left for the claimant but to take what the Land Department would give, viz: patent for the ground north of the placer.

These considerations make it plain that the alleged election to receive patent for the said Northerly tract fulfilled no office, either as furnishing the basis for departmental action or divesting the claimant of any right to patent for the 700 feet tract.

And it is to be observed, again, that this was the view

taken by the land department, for the Commissioner ignores this paper and proceeds to close the case, so far as the 700 feet tract is concerned, as if no such paper had been filed.

The court below held this paper to be two-fold in effect—first, relinquishment of the entry; and, second, abandonment of possessory title.

But even the claimant's attorneys of record appreciated the rule of law that action upon the paper was necessary, assuming it to be an election pursuant to the decision of May 28, 1895; for, as we have shown, in the petition filed by them on June 17, 1898, they ask that action upon it be suspended pending consideration of their application to be allowed to patent both of the detached tracts.

In view of the decision in Lavagnino *v.* Uhlig, *supra*, which overrules the theory of the court below with respect to location upon ground covered by a prior location, it is unnecessary to consider the effect of the filing of the paper of June 14, 1898, upon the possessory title; but, far from being evidence of abandonment of claim either to patent or possessory title, it is an assertion of ownership of the whole Kohnyo claim—note the introduction "which company *is the owner of* the Kohnyo and Fortuna lode mining claims"—and amounted only to submission to the inevitable so far as the patent proceedings were concerned.

The deduction of the court below, that this paper was abandonment of possessory claim, is unaccountable in the face of its frequent declarations that failure of patent proceedings does not affect the possessory title, upon which point the case of Clipper Mining Company *v.* Eli Mining Company (*supra*) is now conclusive, and in the face of the continued applications of the claimant claiming the right

to patent for the said 700 feet tract, until July 18, 1899, when the attorneys of record formally waived all claim to reinstatement (R., p. 56).

Fourth. The paper filed June 14, 1898, even assuming it to be the act of the company, was, in effect, withdrawn by the petition filed three days later praying that the claimant be allowed to patent both of the detached parts of the Kohnyo claim (R., p. 58) and asking for suspension of action upon the said paper pending consideration of such petition (28 L. D., 452).

Fifth. And, finally, the land department ignored the paper in question and the Commissioner, on July 15, 1898, entered the final order (Ex. K R., p. 57), which was merely a superfluous confirmation of the cancellation of the Kohnyo entry as to the Southerly 700 feet tract which took effect at the expiration of sixty days from notice of the decision of May 28, 1895.

If the action of July 15, 1898, was regarded by the Commissioner as necessary to eliminate the Southerly 700 feet tract from the Kohnyo entry, it is clear that he was laboring under a misapprehension of the effect of his decision of May 28, 1895, and any such view entertained by the Commissioner must be held to be overruled by the final authority of the Department, the Secretary, who, as we have shown, declared the decision of May 28, 1895, final and in no wise involved in the proceedings upon the application to include in the Kohnyo application the ground in conflict with the placer.

As Gurney depends wholly upon the location made June 23, 1898, his contention falls with the paper of June 14, 1898, and if the validity of location depends upon the continued existence and final elimination of the Kohnyo entry as to the Southerly tract thereof after June 23, 1898, the contest is reduced to one between Brown and Small.

As we have shown, the proceedings upon the petition of August 14, 1895, were closed by Commissioner's letter of June 27, 1898 (R., p. 58), notifying the local officers that Secretary's decision of May 7, 1898, had become final, and if that date (June 27, 1898), be taken as the time of elimination of the Southerly tract from the Kohnyo entry and validity of location depends upon making location thereafter, Brown is prior to Small by reason of the amended location made July 15, 1898.

And if it be held that the Kohnyo entry existed as to the tract in question, until July 15, 1898, when the Commissioner made the formal, though superfluous, declaration of cancellation, and that valid location could be made only thereafter, Brown is still superior to Small by reason of the amended locations made July 15 and 16, 1898.

Small being plaintiff, the burden was upon him to show priority and superiority over Brown and, with respect to the locations made on July 16, 1898, in the absence of evidence that Small's location was made before Brown's Brown's must prevail.

But with respect to Small, we likewise rely upon the fundamental principles hereinbefore invoked (subdivisions III and IV), that the pendency of the Kohnyo entry proceedings was not a bar to location of the ground in ques-

tion, and that it is immaterial when the ground in question was eliminated from the Kohnyo entry, as well as the contentions in subdivisions I and II.

We submit that the judgment of the supreme court of Colorado must be reversed in both cases, with direction to affirm the judgments of the trial court in favor of Brown.

Respectfully submitted,

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